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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-971

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Petitioner,

—v.—

FRANCINE NEWMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

January 31, 1975

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The Board of Education of the City School District of New York,

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—v.—

Francine Newman,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Board of Education of the City School District of New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing a judgment of the District Court for the Eastern District of New York which had dismissed this action.

Opinions Below

The opinion of the District Court, dated February 15, 1974, has not been reported. The opinion of the Court of Appeals has not yet been reported. Both opinions are appended.

Jurisdiction

The judgment of the Court of Appeals, dated January 6, 1975, was entered on January 8, 1975. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In a federal District Court action the gravamen of which is violation of federal constitutional rights, is the defense of res judicata, based upon the outcome of a state court action grounded upon the same facts, inapplicable solely because plaintiff did not advance constitutional claims in the state court?

If the first question is answered affirmatively, a second question is presented as follows:

2. Is the defense inapplicable even though the constitutional claims had been pleaded, because it does not appear that they were expressly argued or expressly decided?

Statement of the Case

Except to note that District Court jurisdiction was pleaded under U.S.C. §§1331 and 1343, and that no doubt was raised of jurisdiction under §1331, we rely for our statement of the case upon the brief opinion of the Court of Appeals.

Reasons for Granting the Writ

(a)

As to the first question, we rely upon the petition for certiorari in *The Board of Education of the City of New York and John A. Murphy* v. *John F. Lombard*, October Term, 1974, No. 74-941, docketed on or about January 30, 1975 and now pending in this Court. The Court of Appeals here relied upon its decision in that case. The petition there argues that the issue is of great public importance and its determination by the Court of Appeals conflicts with decisions of Courts of Appeals for other circuits and with fundamental policy underlying the res judicata defense.*

Counsel for respondent in each petition is the same. Copies of the earlier petition have already been served.

(b)

If the failure to assert constitutional claims in the state court precludes a res judicata defense, there remain the issues as to whether there was such a failure here, and if there was not, whether the defense is precluded by the fact that the constitutional claims were not expressly decided.

To show that the constitutional claims were raised, we rely upon the state court pleading, accurately quoted in the Court of Appeals opinion at pp. A21-22 of the Appendix.

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* Since that petition was written, yet another law review note has appeared, which, questioning the soundness of that judgment, notes that it is contrary to most federal court decisions and to a dictum of this Court. 43 Fordham Law Review 459, 461 fn. 16 (December 1974).

The Court of Appeals suggests that additional "allegations, elaborations, or citations of authority" must accompany an assertion of "'violation of petitioner's due process and equal protection rights'" in order to raise the constitutional question (App. p. A22). Such a requirement would place an insuperable burden upon many persons who, acting pro se, are unable to elaborate and who, according to the reasoning of the Court of Appeals, not having done so, would be precluded from questioning in this Court the judgment of the state court in which they had not raised their constitutional claims.

In regard to the necessity for an express constitutional ruling, we submit that the Court of Appeals committed a fundamental error in attributing significance to the fact that there was "no mention of any claim of procedural due process in the New York Supreme Court's opinion" (App. p. A21). In *Gregg* v. *Public Utilities Commission*, 281 U.S. 470 (1930), this Court observed (pp. 477-478): "The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it. . . ."

CONCLUSION

This Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

January 31, 1975

Respectfully submitted.

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APPENDICES

APPENDIX A

Opinion of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-473

FRANCINE NEWMAN,

Plaintiff,

--against--

HE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant.

DECISION AND ORDER (February 15, 1974)

, D. J.

endant makes application to this court, seeking sum- judgment dismissing the plaintiff's complaint pur- to Rule 56 of the Federal Rules of Civil Procedure grounds of (1) *res judicata* and (2) plaintiff's failure te a claim upon which relief can be granted. In the ative, defendant requests a stay of this action, pend- ie resolution of the uncompleted state court pro- gs.

ntiff was employed as a health education teacher by oard of Education of the City School District of New [hereinafter "The Board"] and was assigned in that ty to the Far Rockaway High School. On January

26, 1970, David Gordon, then principal of the high school and plaintiff's supervisor, wrote to the Superintendent of Schools, in accordance with the provisions of Section 2568 of the New York Education Law,[1] requesting that a medical examination be given to the plaintiff to determine her mental capacity to perform her pedagogic duties.[2] Plaintiff was requested to submit to a series of examinations which were subsequently conducted on February 13, 1970, February 25, 1970 and April 13, 1970, by two physicians, a psychiatrist and a psychologist. By a memorandum submitted to Deputy Superintendent Lang, it was recommended that the plaintiff was not presently fit for her teaching duties and that she should be placed on a leave of absence for purposes of health improvement for that school year, i.e., September 11, 1970 through June 30, 1971. The recommendation was adopted by the Superintendent and plaintiff was

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[1] Section 2568 reads:

"The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement."

[2] The request was accompanied by a report setting forth the facts justifying the principal's request. The state court found that there was sufficient evidence to warrant the request for a medical examination.

advised that her cumulative absence reserve was sufficient to cover the number of school days involved.

On September 8, 1971 plaintiff requested a medical examination to ascertain whether she could return to her teaching duties for the following school year, i.e., September 10, 1971 to June 30, 1972. She was examined by various physicians and a psychiatrist on October 18, 1971, November 18, 1971 and November 29, 1971. It was medically concluded that plaintiff be again placed on a leave of absence for that school year. By a letter dated January 18, 1972, plaintiff was advised of this determination. Plaintiff's cumulative absence reserve was sufficient to cover her absences only up to October 7, 1971 and, thereafter, her leave of absence would be without compensation.

Plaintiff requested a review of the medical determination by an ad hoc committee of physicians, pursuant to Article IV of the Collective Agreement between the Board and the United Federation of Teachers. This request was heard by a hearing officer and subsequently denied by the Superintendent on October 20, 1971. Subsequently, the United Federation of Teachers on behalf of the petitioner agreed to submit the matter to an arbitrator. The arbitrator's award denied the demand for an ad hoc committee review.[3]

On March 1, 1972, the plaintiff commenced a proceeding in the New York State Supreme Court, Kings County, pursuant to Article 78 of the New York Civil Practice Law and Rules. In substance, the plaintiff sought a court order:

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[3] It should be noted that the plaintiff could have elected to appeal the Superintendent's determination to the Commissioner of Education pursuant to Section 310 of the New York Education Law. In that appeal she could have raised any constitutional objections to the procedure utilized under Section 2568. Op. Dep't of Ed., 62 St. Dep't 57 (1939); *see, Application of Ross*, 284 App. Div. 522, 132 N.Y.S.2d 760 (3d Dept.), *reversed on other grounds*, 308 N.Y. 605, 127 N.E.2d 697 (1954).

(1) directing the Board to restore her to active teaching duty;

(2) directing the Board to rescind its order of July 31, 1970, placing the plaintiff on a forced medical leave of absence from September 11, 1970 through June 30, 1971;

(3) directing the Board to rescind its order of January 18, 1972, placing plaintiff on a forced leave of absence from September 10, 1971 through June 30, 1972;

(4) commanding that the plaintiff's accumulated sick leave days be restored to her for the days between September 11, 1970 through June 30, 1971 and the sum paid to her be credited against the salary due her rather than against her sick leave;

(5) commanding that the plaintiff be paid her salary as a high school teacher from and after September 10, 1971, with interest;

(6) directing the Board to serve upon the plaintiff all medical reports relating to the plaintiff obtained by the Medical Bureau; and

(7) directing the respondents to cease and desist from any acts prejudicing the rights of the plaintiff which are contrary to due process and are intended to conspire against plaintiff's contractual, legal and professional rights.

By a decision dated May 17, 1972, and an order signed on July 6, 1972, Justice Heller denied the plaintiff's petition except insofar as the Board's decision of January 18, 1972, which extended the plaintiff's leave of absence for the 1971-1972 school year. With reference to this latter portion of the plaintiff's application, the court remanded

the issue to the Board to supply an adequate record evidencing a reasonable basis for placing the plaintiff in the status of an inactive employee without compensation from November 7, 1971. The court ordered the Board to conduct another medical examination of the plaintiff and to reconsider its prior determination in light of both the results of the reexamination and the medical reports of independent physicians, which had been submitted by the plaintiff.

Thereafter, plaintiff made application to the Appellate Division of the New York State Supreme Court, Second Department, for leave to appeal Justice Hetter's order. This motion was denied.

On October 10, 1972, in compliance with the court's remand order, the Board requested plaintiff to submit to a medical reexamination. Plaintiff, however, refused to submit to another examination. Instead, plaintiff, on April 5, 1973, filed in this court a complaint against the Board, seeking:

(1) a temporary restraining order, restraining the Board from acting under the color of authority contained in the New York Education Law § 2568 from preventing the plaintiff from pursuing her regular profession as a school teacher for the City of New York;

(2) a preliminary and permanent injunction, enjoining the Board and anyone acting in concert with the Board from preventing the plaintiff from pursuing her regular profession;

(3) a judgment declaring Section 2568 of the New York Education Law unconstitutional, insofar as it authorizes the placing of the plaintiff on an involuntary medical leave of absence without disclosing the medical reports relied upon by the Board, a hearing and due process of law;

(4) a judgment directing the Board to reinstate the plaintiff in her teaching position; and

(5) a judgment awarding plaintiff $39,500 in monetary damages together with interest from July 1, 1970.

Plaintiff predicates jurisdiction in the federal courts upon Title 42 U.S.C. § 1983 and Title 28 U.S.C. §§ 1331 (a), 1343 and 2201 *et seq.*

The doctrine of *res judicata* is based upon a theory of judicial economy and convenience, permitting a court to dispense with the relitigation of a cause of action which has already been adjudicated by another court of competent jurisdiction. The full-faith-and-credit clause of the Constitution requires a federal court to accord final state court judgments full *res judicata* effect. *Gart* v. *Cole*, 263 F.2d 244 (2d Cir.), *cert. denied* 359 U.S. 978 (1959); *Olsen* v. *Board of Ed. of Union Free School Dist. No. 12 Malverne, New York*, 250 F.Supp. 1000 (E.D.N.Y.), *appeal dismissed*, 367 F.2d 565 (1966); *cf. Taylor* v. *New York Transit Auth.*, 433 F.2d 665 (2d Cir. 1970); *Frazier* v. *East Baton Rouge Parish School Bd.*, 363 F.2d 861 (5th Cir. 1966).

The doctrine of *res judicata*, however, can only be invoked after a valid judgment between the same parties or their privies has adjudicated the matter in controversy with finality; that is to say, only a final judgment is amenable to *res judicata* treatment. 1B Moore's Federal Practice ¶0.409[1] p. 1001-1002. By contrast, an interlocutory or intermediate court order will not furnish a defense of *res judicata* to a litigant, unless with respect to some particular matter it makes a final disposition, in which event it would be *res judicata* as to that matter which is concluded. *Id.* at 1002, *citing, Tuolumne Gold Dredging Corp.* v. *Walter*

W. *Johnson Co.*, 71 F.Supp. 111 (N.D.Cal. 1947); RESTATEMENT OF JUDGMENTS, Explanatory Notes § 41, comment *c* at 118 (1942).

> "Because one phase of a litigation was left unsettled and in that sense the judgment is interlocutory does not preclude the holding that the judgment is *res adjudicata* as to that phase which has been finally concluded." *Tuolumne Gold Dredging Corp.* v. *Walter W. Johnson Co.*, 71 F. Supp. at 113.

Thus, in the case at bar, this court is not precluded from granting the state court judgment *res judicata* effect merely because it was partially interlocutory in nature, if other aspects of the judgment were conclusively resolved by the state court. The interlocutory portion of the state court order involved only the issue of the plaintiff's reinstatement to her teaching post for the 1971 school year. This can be distinguished from the other portion of the state court order which dealt with the propriety of the Board's initial determination to place the plaintiff on a medical leave of absence during the 1970 school year.

It becomes essential, therefore, to closely scrutinize the prior state court decision to ascertain whether the conclusive portion of the judgment was in fact on the merits and, therefore, final in nature. Plaintiff maintains that Justice Heller's dismissal of her Article 78 proceeding was predicated upon a failure to comply with the four-month statute of limitations and was not, consequently, on the merits. However, a careful examination of the state court's opinion and the subsequent court order indicates no support for such a contention. In the state court's eight page

opinion only a single paragraph touched upon the issue of noncompliance with the period of limitations, and then only by way of an aside.

> "In any event, the letter dated July 31, 1970 was a determination placing her on inactive status and granting a leave of absence. She exhausted her administrative remedies with respect to that determination on September 28, 1971, the date of the arbitrator's award. The proceeding was commenced on March 2, 1971. There was no compliance with the four-month period of limitations set forth in CPLR 217." (Citations omitted).

It is also clear that the court did explicitly reach the merits of a number of specific issues raised by the plaintiff, to wit:

(1) that there was a sufficient basis for the report of the principal, Gordon, requesting a medical examination of the plaintiff;

(2) that the plaintiff did not have the right to a review by an ad hoc committee of physicians;

(3) that the plaintiff was not entitled to the medical reports of the Board's Medical Bureau; and

(4) that the plaintiff was not entitled to be accompanied by a physician or other person of her own choice when being examined by the Medical Bureau to determine whether she was fit to be reinstated to her position.[4] At

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[4] Moreover, it is arguable that the case at bar falls within the ambit of *Taylor* v. *New York Transit Auth.*, 433 F.2d 665 (2d Cir. 1970). In that case a final administrative determination was held to be *res judicata* in the federal courts even though the state

best, it can only be argued that the dismissal of the plaintiff's state court action was founded upon alternative theories, one on the merits and the other based upon an expiration of the statute of limitations.

> "Where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment, and a subsequent action based upon the same cause of action is ordinarily barred." RESTATEMENT OF JUDGMENTS, Explanatory Notes § 49, comment *c* at 196 (1942).

A more intricate and vexatious question arises as to whether the plaintiff proceeds here upon the same "cause of action" as that previously advanced in the prior state court proceeding. The task is exacerbated by the fact that both

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court had dismissed the plaintiff's Article 78 proceeding on the basis of lack of jurisdiction and/or lapsing of the statute of limitations. Similarly, in the present action plaintiff was granted an opportunity to argue the merits of her claim before a hearing officer and the subsequent dismissal of her appeal to the Superintendent was final, unless reversed by the Commissioner of Education.

Thus, it can be said that the administrative decision was final and the *Taylor* decision applicable:

> "While the state courts perceived themselves as powerless . . . to hear Taylor's belated Article 78 proceeding claim, it was only because the due process claim was not raised in the first instance before the Commission that they could not do so. Had appellant prosecuted his constitutional objection in a timely manner, and had the Commission made an unsatisfactory disposition thereof, the courts of New York in the exercise of their responsibility under the Supremacy Clause of the United States Constitution to entertain federal constitutional questions, no doubt would have taken jurisdiction of appellant's case." *Id.* at 668. (Citations omitted).

courts and legal scholars have been unable to formulate a single immutable definition of the term "cause of action." As Mr. Justice Cardozo stated, and it is still applicable,

> "A 'cause of action' may mean one thing for one purpose and something different for another . . . . This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or the relation to be governed." *United States* v. *Memphis Oil Co.*, 288 U.S. 62, 67-68 (1933).

The question of the similarity of "causes of action" becomes more than idle intellectual curiosity in the case at hand, since it has long been held that where the two actions are predicated upon the same "causes of action" a judgment in one suit is conclusive and bars the relitigation of matters actually litigated as well as other matters which might have been litigated. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877); *Kalbelka* v. *City of New York*, 353 F.Supp. 7 (S.D.N.Y. 1973). A number of tests have evolved to determine what actually constitutes the same "cause of action". One test emphasizes a technical "rights" approach, that is, if the factual pattern shows one "primary right" of the plaintiff and one wrong done by the defendant which involves that right, the plaintiff is said to possess but a single "cause of action." The rationale for this approach is based upon a theory that there can only be one recovery for an injury caused by a single wrong. *See Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1869); RESTATEMENT OF JUDGMENTS § 61 at 240 (1942). Another approach rests upon a comparison of the aggregate operative facts. This view, often termed the factual pragmatic approach, finds increasing support in courts today because of the liberalization of

the rules regulating joinder, counterclaims and amendment. Still yet, another approach has found an identity of "causes of action" to exist where the subject matter and the ultimate issues in both the old and new proceedings are the same. *See* Res Judicata, 38 YALE L.J. 299, 313-314. More recently, the necessary measure of identity has been held to exist when a different judgment in the second action would destroy or impair rights or interests established by the first judgment. *Moreno v. Marbil Productions, Inc.*, 296 F.2d 543, 545 (2d Cir. 1961).

Plaintiff would lead this court to believe that since the relief requested in this case is dissimilar from that sought in the previous suit, the "causes of action" are different and the doctrine of *res judicata* is inapplicable. Suffice it to say that such an approach, though it possesses a simplistic and economical quality, is not dispositive and is insufficient in this context. Moreover, this court, in stripping away the facade of dissimilarity in legal verbiage, finds the relief sought in both actions to be essentially the same, i.e., reinstatement to plaintiff's teaching duties, nullification of the Board's determinations to place plaintiff on a medical leave of absence, the right to examine the Medical Bureau's reports, and compensation for the loss of wages or for the loss of cumulative absence reserve days. "The additional prayer for declaratory and injunctive relief cannot salvage an otherwise defective complaint and confer jurisdiction where none exists." *Tang v. Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d 128, fn.6 at 142.

It becomes apparent that the present action is entirely based upon the same set of facts and subject matter which gave rise to the former state court proceeding and that the plaintiff is attempting here to recover upon the same al-

leged "primary wrong," which served as a foundation for the first action. Similarly, this court believes that a judgment in favor of the plaintiff would substantially destroy or impair the rights and interests established by the state court judgment. Thus, reducing plaintiff's claims to the most basic elements, this court finds both actions to be predicated upon the identical "cause of action."

If any dissimilarity does exist between the two cases, it lies only in the "theory of the action" upon which the plaintiff presents her claims. The present suit, unlike the former, is couched in terms of a Civil Rights action under Title 42 U.S.C. § 1983. It has long been held, however, that the recasting of an issue in the form of a Civil Rights action will not provide a litigant with a vehicle to circumvent the *res judicata* effect of a prior state court judgment. *See, e.g., Tang* v. *Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d at 142; *Bricker* v. *Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Johnson* v. *Dep't of Water & Power of Los Angeles*, 450 F.2d 294 (9th Cir.), *cert. denied*, 405 U.S. 1072 (1971); *Murray* v. *Oswald*, 333 F.Supp. 490 (S.D.N.Y. 1971).

Similarly, it would appear that plaintiff presents a new theory of action by challenging the constitutionality of Section 2568 of the New York Education Law. Although it may be conceded that the plaintiff did not directly attack the section's validity, she did raise the issue of due process violations in both her state court petition[5] and in

[5] In Paragraph 34 of plaintiff's petition filed with the New York State Supreme Court, Kings County, she alleged that:

"Petitioner's forced medical leave of absence has been accomplished in violation of petitioner's due process and equal protection rights which entitle her to a due process hearing on charges as a prerequisite to suspension. Education Law § 2573 (5)."

her request for relief.[6] The mere fact that the state court was silent as to the constitutional issue presented is immaterial. *Tang* v. *Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d 138, 141 (2d Cir. 1973); *citing, Grubb* v. *Public Util. Comm'n*, 281 U.S. 470, 477-478 (1930).

Even if this court were to construe plaintiff's allegations in the former action as not being a constitutional challenge of the Board's procedures, it does not necessarily follow that the plaintiff can pose the issue for the first time in this court and thereby relitigate her cause of action. As previously noted, the doctrine of *res judicata* bars the relitigation of issues actually presented as well as those which could have been presented in the first action. Plaintiff is not entitled to advance her claims in a piecemeal fashion. More specifically, it has been held that the failure to raise constitutional questions in the state courts may not be used to preserve a plaintiff's right to enter a federal court at a later time upon the same facts, alleging the same wrong and seeking the same recovery, simply because he presents a new theory based on constitutional deprivation. *E.g., Resolute Ins. Co.* v. *State of North Carolina*, 276 F.Supp. 660 (E.D.N.C. 1967), *aff'd*, 397 F.2d 586 (4th Cir. 1968), *cert. denied*, 393 U.S. 978 (1968); *Robbins* v. *Police Pension Fund*, 321 F.Supp. 93 (S.D.N.Y. 1970). Under New York law such a constitutional objection might have been raised and adjudicated in the plaintiff's Article 78 proceeding. *Matter of Struppoli* v. *Bickal*, 21 App. Div.2d 365, 250 N.Y.S.2d 969 (4th Dep't 1964);

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[6] Plaintiff had specifically requested an order of the state court:

"directing the respondents to cease and desist from any acts prejudicing the rights of the plaintiff which are contrary to due process and are intended to conspire against plaintiff's contractual, legal and professional rights."

aff'd, 16 N.Y.2d 652, 261 N.Y.S.2d 84, 209 N.E.2d 123 (1965). *See Taylor* v. *New York City Transit Auth.*, 433 F.2d 665 (2d Cir. 1970).

In *Frazier* v. *East Baton Rouge Parish School Bd.*, *supra*, a teacher in the state public school system had been dismissed by the school board and the Louisiana state courts subsequently upheld the board's determination. The teacher then brought suit under the Civil Rights Act alleging for the first time a constitutional claim of discrimination. The Fifth Circuit Court of Appeals in affirming the district court's dismissal of the action, concluded that:

> "If state administrative action is first challenged in the state court, and the state court acts judicially, the state decision is *res judicata* and bars a decision by a federal court. Under the doctrine of *res judicata*, where the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated *or might have been litigated* in the first action. Therefore, the decision of the state court of appeals, acting judicially, is a bar to Frazier's claim in the federal district court even though he raises his federal claim of discrimination for the first time in the federal court. In these circumstances, once Frazier submitted his challenge to state administrative action to state judicial review, the only appropriate federal forum for review of his alleged federal claim of discrimination was the United States Supreme Court." 363 F.2d at 862. (Citations omitted).

See also Howe v. *Brouse*, 422 F.2d 347 (8th Cir. 1970); *Adamczyk* v. *Margis*, 359 F.Supp. 423 (E.D. Wis. 1973); *Morey* v. *Independent School Dist. No. 492*, 312 F.Supp.

1257 (D. Minn. 1969), *aff'd*, 429 F.2d 861 (8th Cir. 1970). This court rejects plaintiff's contention that the state court failed to act "judicially" by never reaching the constitutional issue involved, since the state courts in *Frazier* similarly never reached the pertinent constitutional question and yet they were deemed to have acted "judicially." *See also Tang* v. *Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d at 141.

Plaintiff cites *Stewart* v. *Pearce*, 484 F.2d 1031, 1033 (5th Cir. 1973), for the proposition that the Civil Rights Act is ". . . supplementary to the state remedy and the latter need not be sought and refused before the federal one is invoked." This statement, although true, is inapposite to the facts presented herein. That statement was made by the court in distinguishing between actions under the Civil Rights Act and other proceedings where exhaustion of state remedies is required. *Stewart* v. *Pearce* dealt with an injunctive action to reinstate an English instructor, after the dean of the college had transferred him to a different position following the plaintiff's refusal to undergo a psychiatric examination. The court found that the instructor's procedural due process rights were violated and the transfer was invalid for failure to give the instructor reasons for the examination, notice of a hearing and a proper hearing. Admittedly, the factual patterns are similar, but one essential aspect of this action differs from that presented in the *Stewart* case, namely, that the latter did not deal with a prior state court judgment or with the issue of *res judicata*.

Ordinarily the intermediate aspect of the state court's judgment, i.e., the remanding to the Board for reconsideration of its determination of January 18, 1972 placing the plaintiff on a forced leave of absence from September 19,

1971 through June 30, 1972, would not be accorded *res judicata* effect and this court would stay the present action pending compliance with the provisions of the remand order. *See Simons* v. *Wetherell*, 472 F.2d 509 (2d Cir. 1973). However, in the present context a stay of proceedings would prove to be only an empty gesture. For all intents and purposes the state court action has been concluded,[7] and nothing remains to be litigated therein. Defendant has to the best of its ability fulfilled the conditions of the court's remand order by requesting plaintiff to submit to a medical reexamination. It is only the plaintiff's refusal to submit to another examination which has forestalled total compliance with the court's order and created this hiatus in the state court proceeding. This court is of the belief that a stay of the present action would be inappropriate since the state court has adjudicated all the pertinent legal questions presented by the case at bar. Any question still unresolved by the state court order deals exclusively with the plaintiff's alleged right to reinstatement for the 1971 school year, rather than the procedures used by the Board in initially placing the plaintiff on a medical leave of absence in 1970. Section 2568 relates solely to the Board's initial determination and a constitutional challenge to the section involves an attack upon the conclusive portion of the state court order and not the interlocutory aspect.

Plaintiff maintains that "the defendant may not force [her] to pursue her state remedies, thus choosing for

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[7] Even plaintiff admits that:

"if a state proceeding is pending it is because the defendant has not taken any steps to enter the required order to terminate the same. *The plaintiff surely does not at this time stand as a litigant in the state court.*" (Plaintiff's Memorandum of Law p. 7). (Emphasis added).

her the forum in which she seeks to redress the injury she has suffered." (Plaintiff's Memorandum of Law p. 6). But plaintiff has already made a conscious choice of forums by initiating her action in the state courts,[8] which are equally empowered to pass upon issues of constitutionality.[9] Plaintiff has had her day in court and her defeat in the prior action cannot be sidestepped by a collateral attack in this court or by forum shopping. Plaintiff's attempt to proceed here upon the same "cause of action," which was fully presented in the Board's administrative hearing, the arbitration hearing and the Article 78 proceeding, cannot be sanctioned. This court will not permit the plaintiff to take an additional bite of the cherry under the guise of different legal verbiage. Having lost in the state courts, plaintiff's available remedy was to seek review by the United States Supreme Court.[10] Plaintiff's commencement of the present action is merely a form of forum shopping, which the doctrine of *res judi-*

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[8] Plaintiff was not dragged into the state courts, she freely selected to adjudicate her claims in that forum, rather than initially bringing a Civil Rights action in this court. *Tang* v. *Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d at 141-143.

[9] "State courts are generally capable of giving full and fair consideration to federal constitutional claims. . . . The fact that a federal constitutional issue is involved in the suit is not a reason to deny full faith and credit to the state court proceedings. This is so even where the federal claim is not presented to or decided by the state court. . . ." *Porter* v. *Nossen*, 360 F.Supp. 527, 528-529 (M.D. Pa. 1973). (Footnotes omitted); *see NAACP* v. *Button*, 371 U.S. 415, 427-428 (1963).

[10] 28 U.S.C. 1257(2); *see Tang* v. *Appellate Division of the N.Y. Supreme Ct., First Dept.*, 487 F.2d 138, 141-142 (2d Cir. 1973); *citing, Anderson* v. *Lecon Properties, Inc.*, 457 F.2d 929 (8th Cir.), *cert. denied*, 409 U.S. 879 (1972).

cata was designed to eliminate. Moreover, as the court stated in *Taylor* v. *New York City Transit Auth., supra*:

> "[W]e do not perceive a compelling federal interest to be vindicated which would necessitate overriding clearly strong New York state interests with regard to the finality of state agency decisions and the regulation of state employee behavior, within judicially supervised constitutional limits, of course. To allow collateral attacks on these interests in a federal forum would be to deliver unnecessary and potentially debilitating blows to legitimate areas of State responsibility." *Taylor* v. *New York City Transit Auth.*, 433 F.2d at 671.

In light of the foregoing, this court need not reach defendant's other stated grounds for requesting a dismissal of the complaint.

Accordingly, it is

ORDERED, that the defendant's motion for summary judgment dismissing plaintiff's complaint be and the same is hereby granted on the ground of *res judicata*.

ANTHONY J. TRAVIA
U.S.D.J.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 101—September Term, 1974.

(Argued November 25, 1974 Decided January 6, 1975.)

Docket No. 74-1845

FRANCINE NEWMAN,

Plaintiff-Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant-Appellee.

Before:

CLARK, *Associate Justice,** MOORE and TIMBERS, *Circuit Judges.*

Appeal from a judgment of United States District Court for the Eastern District of New York, Travia, *J.*, granting summary judgment in favor of the defendant on the ground of res judicata.

Reversed.

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

GENE ANN CONDON, New York, New York, *for Appellant.*

ALFRED WEINSTEIN, New York, New York; Adrian P. Burke, Corporation Counsel of the City of New York, L. Kevin Sheridan and H. Kenneth Wolfe, of counsel, *for Appellee.*

PER CURIAM:

Appellant—Francine Newman is a tenured, licensed teacher with some 18 years' experience in the New York City school system. As the result of a medical finding that she was psychologically "not fit at present for teaching duty," appellant was placed on involuntary leave of absence without pay by the Board of Education from September 11, 1970, to June 30, 1971. On September 25, 1971, she was directed to resubmit to a mental examination and was again placed on involuntary medical leave without pay until June 30, 1972.

Pursuant to Article 78 of the New York Civil Practice Laws and Rules, she filed a petition for review of these determinations in the New York Supreme Court, seeking: (a) to annul the original determination of unfitness; (b) to direct that her leave of absence not be counted against her accumulated sick leave; and (c) to require the Board to furnish her copies of all medical reports relied upon in its determinations. The state court denied her this relief, but concluded that the second determination of unfitness for school years 1971-72 was not based on the requisite medical findings and remanded the case to the Board for the formulation of an adequate record. The court

ordered the Board to conduct another examination of appellant and to reconsider its determination in light of this re-examination and any medical reports of independent physicians submitted by appellant.[1]

Following denial of leave to appeal by the Appellate Division and Court of Appeals, Ms. Newman brought this suit for declaratory and injunctive relief under 42 U.S.C. §1983, claiming that the Board had violated her right to procedural due process by not providing her an adversary proceeding. On February 15, 1974, the District Court granted the Board's motion for summary judgment on the ground that the earlier state court decision was *res judicata* of the matter. At that time, the District Court did not have the benefit of the decision of this Circuit in *Lombard* v. *Board of Education*, 502 F.2d 631 (2d Cir. 1974), which was announced on July 22, 1974. We believe that *Lombard* controls both the *res judicata* and due process questions.

It is clear from the record that appellant never raised her federal constitutional claims in the state court. There is no mention of any claim of procedural due process in the New York Supreme Court's opinion; indeed, it specifically went off on other considerations. The United States District Court, however, concluded that appellant "did raise the issue of due process violations" in her state court petition, citing paragraph 34 of the complaint. That paragraph follows:

> 34. Petitioner's forced medical leave of absence has been accomplished in violation of petitioner's due proc-

[1] Appellant has since refused to undergo any further mental examinations by the Board.

> ess and equal protection rights, and in disregard of her tenure rights which entitled her to a due process hearing on charges as a prerequisite to suspension. Education Law, Section 2573 (5).

No allegation, elaborations, or citations of authority accompany this, the sole mention of the phrase "due process" in appellant's entire twelve-page petition. We conclude therefore that her due process claim was neither raised nor adjudicated in the New York Supreme Court.

Under the authority of *Lombard*, we are obliged to reverse the judgment and remand the case for further proceedings in light of this opinion.

Reversed.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-971

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Petitioner,

-against-

FRANCINE NEWMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Conrad J. Lynn
Attorney for Respondent
233 Broadway
New York, New York 10007

March 4, 1975

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-971

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Petitioner,

-against-

FRANCINE NEWMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent, Francine Newman, opposes the granting of a petition for certiorari in this matter for the following reasons:

1. The state court judgment entered in a special proceeding in the nature of mandamus did not, and could not have, determined the constitutional issues raised in the Federal action.

2. The constitutional claims were not pleaded, briefed, argued or decided in the state court action.

Reasons for Denying the Writ

The petitioner here relies upon the argument and authorities set forth in its petition for certiorari in The Board of Education of the City of New York and John A. Murphy v. John F. Lombard, October Term, 1974, No. 74-941, docketed on or about January 30, 1975 and now pending in this Court, with respect to the first question presented and additionally claims at bar that the respondent Newman pleaded her constitutional claims in the state courts.

The respondent Newman will here set forth again substantially the first branch of the argument submitted in the Lombard brief. Counsel for the respondent in both petitions is the same.

The petitioner bases its argument that a conflict exists between the Courts of Appeals between the circuits through a misinterpretation of the Second Circuit's holding in the Lombard case and the principles set forth by the appellate courts in other circuits upon facts which are dissimilar to those at bar.

Firstly, the respondent's state action in the nature of a mandamus sought to annul and set aside an administrative determination on the ground that it was arbitrary, capricious and unreasonable. The proceeding was a so-called Article 78 action pursuant to Sections 7801 et seq. of the New York Civil Practice Law and Rules. Section 7803 of the Article limits the application of the statute as follows:

"Section 7803.

"The only questions that may be raised in proceedings under this article are:

"1. whether the body or officer failed to perform a duty enjoined upon it by law; or

"2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearding held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. As amended, L. 1962, c. 318, Sec. 26."

The state court proceeding was not a proper vehicle to test constitutionality. Matter of Jerry v. Board of Education, 44 A.D. 2d 198 (4th Dept., 1974); Robbins v. Police Pension Fund, 321 F. Supp. 93.

The authorities cited by the petitioner do not apply at bar. The core of each of the cases cited is that the state court judgment was entered either after trial or upon review of an administrative hearing which comported with due process standards. Ms. Newman never received a hearing or trial at

the administrative or state court level. Although the petitioner makes frequent reference (as does the Comment in 88 Harvard Law Review 453 cited by the petitioner) to the "hearing" accorded the respondent, at no time was any proceeding even vaguely approaching a hearing held.

In Lovely v. Laliberte, 498 F. 2d 1261 (1st Cir., 1974) the state court judgment had been entered after trial; in Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861 (5th Cir., 1966), the appellant had a full hearing prior to dismissal and the School Board's action was sustained by the state court after a full hearing in that court. Howe v. Brouse, 422 F. 2d 347 (8th Cir., 1970) was decided on the issue of judicial immunity in the state court, and the same issue was pivotal to the Federal action. In Johnson v. Department of Water & Power of the City of Los Angeles, et al., 450 F. 2d 294 (9th Cir., 1971), the appellant received a hearing and a rehearing before the state

civil service commission. The court in Johnson specifically held that the appellant had every opportunity to present his side of the case in the state courts. This opportunity was not afforded the respondent at bar. In Francisco Enterprises v. Kirby, 482 F. 2d 481 (9th Cir., 1973), there was a full hearing before an impartial hearing officer at the administrative level.

The petitioner also misconstrues the holding in Thistlewaite v. City of New York, 497 F. 2d 138 (2d Cir., 1974), cert. den. Docket #74-524, 43 U.S.L.W. 3355, December 24, 1974. In Thistlewaite, the appellant had been convicted after trial at which all constitutional questions presented to the District Court were determined by the state court. Further, Thistlewaite involved collateral attack upon a state criminal conviction and is inapposite here.

Nor is Tang v. Appellate Division, First Department, 487 F. 2d 138 (2d Dept.,

1973), cert. den. 416 U.S. 906 (1974) supportive of the petitioner's argument at bar. In Fang it was conceded that the appellant raised the same constitutional issues in his state and Federal actions. There was also the additional element of the state court's administration of the state bar which appeared to influence the Federal court's decision not to pass on the issues presented to it.

The petitioner's reliance upon Angel v. Bullington, 330 U.S. 183 (1946) is misguided. That decision dealt with the standing of parties in an action where diversity of citizenship was the basis of Federal jurisdiction. This Court held that for purposes of diversity jurisdiction a Federal court is in effect only another court of the state. This statement, of course, does not apply to actions commenced under the Civil Rights Act which is clearly supplementary to available state remedies.

Nor does this Court's holding in Prieser v. Rodrigues, et al., 411 U.S. 475 (1973) provide authority for the petitioner's argument here. The burden of the Prieser holding was that where state prisoners seek to challenge state "good time" procedures, their remedy is by hadeas corpus and consequently they must exhaust state remedies before invoking Federal Jurisdiction.

Clearly, the state proceeding pursuant to NYCPLR Article 78 is not the same cause of action as the respondent's suit under the Civil Rights Act. The first action goes to the weight of proof before the administrative agency and the second to the very core of First and Fourteenth Amendment rights.

In the Petitioner's Reply to Brief in Opposition to Petition for Certiorari in the Lombard case, submitted purportedly in response to the "new issue" raised in the

Respondent's Brief in Opposition to the Petition for Certiorari, the petitioner misreads the New York law with respect to the determination of constitutional issues in an Article 78 proceeding.

A clear understanding of the cases requires reference to NYCPLR, Section 103 (c) which provides:

> "Section 103. Form of civil judicial proceedings.
>
> * * *
>
> "(c) Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

In the cases cited by the petitioner the constitutional issues had been pleaded, briefed and submitted to the court in an Article 78 proceeding and the New York Courts held, in the spirit of the liberal interpretation mandated by NYCPLR, Section

103 (c), that rather than dismissing the proceedings they would treat them as actions for a declaratory judgment. The courts in their discretion elected to treat the proceedings as actions for declaratory judgment. The option was in no way available to the parties as the petitioner here would have this Court infer.

The cases cited by the petitioner are in no way applicable to the respondents Lombard or Newman because these respondents pleaded, briefed, argued and submitted only the issues cognizable in Article 78 proceedings.

The petitioner in its Reply Brief in Lombard cites Matter of Gold v. Lomenzo, 29 N.Y. 2d 468, 476, footnote 4, 280 N.E. 2d 640, 644, footnote 4 (1972). The footnote states in its entirety:

> "Although article 78 proceedings are inappropriate vehicles to test the constitutionality of legislative enactments and it has been said that the proper remedy is an action for a declaratory judgment, the issue is cognizable in the instant proceeding since all necessary parties are before the court and the article 78 proceeding may be treated as an action for a declaratory judgment (CPLR 103, subd (c); cf. Matter of Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y. 2d 400, 407; Matter of Overhill Bldg. Co. v. Delany, 28 N.Y. 2d 449, 458.)" (Emphasis supplied.)

In the Gold case, the pleadings raised and the trial court determined the constitutional issue.

In the Lakeland Water District case the issue was not the constitutionality of the statute but rather the jurisdiction of the court to review the rate-making authority of the respondent. And in Matter of Overhill Bldg. Co. v. Delany, supra, the New York Court of Appeals held at p. 458 of 28 N.Y. 2d:

> "Thus, Article 78 proceedings continue to be inappropriate vehicles to test the constitutionality of legislative

enactments, and the respondent's remedy is an action for declaratory judgment."

* * *

"Accordingly, the order appealed from should be reversed, with costs and the petition dismissed, without prejudice to any action for a declaratory judgment which respondent, if so advised, may wish to institute."

Matter of Phelan v. Theatrical Protective Union, 22 N.Y. 2d 34, 41, 238 N.E. 2d 299 (1968), cited by petitioner at page 2 of its Reply Brief in Lombard is authority for the proposition:

"Similarly, CPLR 3017 (subd.(a)) provides, in part, that a court 'may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded." (Emphasis supplied.)

There is no allegation by the petitioners, either in Lombard or at bar, that any proof was offered on the constitutional issue in the state courts.

Thus the petitioner seeks to avoid confronting the constitutional issue in the Federal Court through a series of strained

propositions, none of which fit the facts at bar. It may well be that if the New York Courts had proof on the constitutional issue before them they could have, sua sponte, dealt with that issue by treating the Article 78 proceedings as actions for a declaratory judgment. But there was no such proof and the New York Courts did not elect to treat the respondent's state proceeding as anything other than what it was - a challenge to the administrative conclusion, not a challenge to the procedures through which the conclusion was reached. The latter challenge raises the due process issue which is properly before the Federal Court.

In Roosevelt Raceway v. County of Nassau, 18 N.Y. 2d 30, 41, 218 N.E. 2d 539, 544 (1966), also cited at page 2 of the petitioners' brief in Lombard and thus incorporated by reference in its brief in support of certiorari here, the "constitutionality" which the court held could be tested in

an Article 78 proceeding was that aspect of construction under CPLR 7803, to which the court specifically refers, which relates to the issue of whether the power to enact certain legislation was in excess of the respondent's jurisdiction under the New York State Constitution and the New York "Home Rule" Law. The case has no bearing on the issues at bar.

The petitioner argues that the respondent Newman did in fact submit the constitutional issue to the New York Courts by the single inclusion of the words "due process" in her twelve-page petition.

The Second Circuit held, however:

> "It is clear from the record that appellant never raised her federal constitutional claims in the state court. There is no mention of any claim of procedureal due process in the New York Supreme Court's opinion; indeed, it specifically went off on other considerations." (Appendix, p. A-21)

The single passing reference to "due process" is in sharp contrast to the

facts in Grubb v. Public Utilities Commission, (cited by petitioner as Gregg v. Public Utilities Commission), 281 U.S. 470 (1930), where this Court noted:

> "The question of the constitutionality validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order." (Emphasis supplied.)

In Kovarsky v. Housing & Development Administration, 31 N.Y. 2d 184, 192, 286 N.E. 2d 882, 886 (1972), also cited by the petitioner at page 2 of its Reply Brief in Lombard, the thrust of the action was to challenge the constitutionality of a legislative enactment. At pp. 191-192 the New York Court of Appeals again holds than an Article 78 proceeding is not the "proper vehicle to test legislative enactments", citing Matter of Gold v. Lomenzo, Matter of Overhill Bldg. Co. v. Delany and Matter of Lakeland Water District v. Onondaga County Water Authority, all cited as pointed out supra, by the petitioner here as authority

for the negative of the principle actually enunciated by the New York Court of Appeals.

The Kovarsky Court specifically pointed out that the issue of constitutionality had been briefed by all parties before the court.

Finally, the petitioner raises the spectre of multiple litigation should the Court of Appeals' decision stand. The fact is that multiple litigation is a far greater burden on individuals in the respondent's position than upon the petitioners. No plaintiff seeks multiple suits with the concomitant expenditure of time and money that such necessarily entail.

New York needs a firm Federal court holding as to the respects in which the procedures of the Board of Education violate Federal due process requirements. Such holding will mandate a change in the petitioner's procedures and thus diminish

both state and Federal litigation because abuses such as those exposed in the Lombard and Newman cases are not peculiar to their cases and have in fact resulted in the commencement of litigation by others similarly affected, as well as the mute suffering of the loss of income, professional standing and good name by many others with niether the money nor sophistication to pursue their rights.

The petitioner's practice of revoking licenses, stigmatizing teachers as mentally ill, forcing them to go on involuntary medical leave without pay - all without a hearing, sworn testimony, an opportunity for the teacher to confront the lay or medical witnesses against them and an opportunity to cross examine them, all under color of state law, is manifestly the very type of abuse that the Civil Rights Act was enacted to correct.

There is no conflict on the issues here presented between the Circuit Courts of Appeals. Each of the cases cited by the petitioner is clearly distinguishable on its facts. The rule as set forth in Kaufman v. Moss, 420 F. 2d 1270 (3rd Cir.), cert. den. 400 U.S. 846, cited with favor in Mastraccio v. Ricci, 498 F. 2d 1257 (1st Cir., 1974) is "...reasonable doubt as to what was decided by a prior judgment should be resolved against using it as estoppel."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE DENIED.

Respectfully submitted,

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Dated: March 4, 1975.